



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

MAY 16 2019

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Request for Waiver Pursuant to the Criminal Statute, 18 U.S.C. § 208(b)(1)

FROM: Justina Fugh 
Alternate Designated Agency Ethics Official

TO: Dr. Bridget Cotti-Rausch
IPA Detailee to Office of Wetlands, Oceans, and Watersheds

RE: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

This memorandum provides you a waiver, pursuant to 18 U.S.C. §208(b)(1), that allows you to participate in certain particular matters while on detail from the Coastal States Organization to the Environmental Protection Agency (EPA), Office of Wetlands, Oceans, and Watersheds, under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.*¹ While on detail under the IPA, you remain an employee of the Coastal States Organization. As such you are prohibited by the criminal law from participating in any particular matter that could have direct and predictable effect on the interests of the Coastal States Organization, absent a waiver under 18 U.S.C. § 208(b)(1).

The criminal conflict of interest statute, 18 U.S.C. § 208(a), prohibits an executive branch employee from participating personally and substantially in any particular matter in which the employee knows that he or she has a financial interest directly and predictably affected by the matter, or in which the employee knows that a person whose interests are imputed to the employee has a financial interest directly and predictably affected by the matter, unless the employee has received a waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualifies for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For purposes of the criminal conflict of interest statute, the financial interests of the following persons are imputed to the employee: any spouse or minor child of the employee; any general partner of a partnership in which the employee is a limited or general partner; any organization in which the employee serves as officer, director, trustee, general partner or employee; and any person or organization with which the employee is

¹ Individuals detailed to EPA under an IPA are considered "employees" for the purposes of the federal conflict of interest statutes codified at Title 18 of the United States Code, including 18 U.S.C. § 208(a), and the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635. 5 U.S.C. § 3374(c); 5 C.F.R. § 2635.102(h) (defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*").

negotiating or has an arrangement concerning prospective employment. The term “particular matter” includes only matters that involve deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters that do not involve formal parties and may extend to legislation or policymaking that is narrowly focused on the interests of a discrete and identifiable class of persons.

Under 18 U.S.C. § 208(b)(1), an agency may permit an employee to participate in a matter in which the employee has an otherwise disqualifying financial interest, if it is determined that the disqualifying financial interest is “not so substantial as to be deemed likely to affect the integrity of the employee’s services to the Government.” Based on the totality of the circumstances, I have determined that the financial interests subject to this waiver are not so substantial as to be deemed likely to affect the integrity of your services to the Government. Therefore, I grant you this waiver under 18 U.S.C. §208(b)(1), which authorizes you to participate in certain particular matters, as discussed below.

Background

You currently are employed as an Ocean and Coastal Policy Analyst for the Coastal States Organization. In this position, you work closely with the coastal management community of 34 state and territory coastal management programs on a variety of coastal and ocean issues, and seek to foster continued collaboration between federal, state, and local entities.

EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes.

EPA’s Office of Water is responsible for implementing the Clean Water Act and Safe Drinking Water Act, portions of the Coastal Zone Act Reauthorization Amendments of 1990, Resource Conservation and Recovery Act, Ocean Dumping Ban Act, Marine Protection, Research and Sanctuaries Act, Shore Protection Act, Marine Plastics Pollution Research and Control Act, London Dumping Convention, the International Convention for the Prevention of Pollution from Ships and several other statutes. The Office of Water works alongside other EPA regional offices and components, other Federal Agencies, state and local governments, American Indian tribes, the regulated community, organized professional and interest groups, land owners and managers, and the public-at-large. It provides guidance, specifies scientific methods and data collection requirements, performs oversight and facilitates communication among those involved. The Office of Water also helps states and American Indian Tribes build capacity, and also delegates water programs to them for implementation.

The Coastal States Organization is a non-profit organization that seeks to help states maintain their leadership roles in the development and implementation of national coastal and ocean policy. It does so by working with Congress to shape legislation and arrange for state

testimony. The Coastal States Organization also works with Federal Agencies to comment on proposed regulations, as well as advocates for increased federal funding and support of state-based coastal and ocean programs, as well as responsiveness of federal agency program administration and policies to state concerns.

The Coastal States Organization works alongside EPA to protect marine ecosystems and coastal communities. The Coastal States Organization is not regulated by EPA, though it does comment on EPA rulemakings and shares information with EPA. Additionally, as the Coastal States Organization has a membership comprised of coastal states, commonwealths, and territories, whose representatives are appointed by their respective Governors, some members of the Coastal States Organization are directly regulated by EPA.

At EPA, you will be assigned to the Office of Wetlands, Oceans, and Watersheds (OWOW), in the Office of Water, where you will serve as an Environmental Protection Specialist. Among your duties, you will assist in fostering collaboration between coastal state agencies and OWOW's partnerships programs to 1) advance mutual goals; 2) provide guidance and leadership for EPA programs seeking to partner more closely with coastal states and territories; and 3) partner with Federal Agencies such as the National Oceanic and Atmospheric Administration, as well as state coastal programs, to improve integration of national coastal data to benefit decision makers. In carrying out these duties, there may be occasions where you will attend meetings at which the Coastal States Organization, along with other interested parties, will be present. Additionally, while carrying out your EPA duties to collaborate with coastal states, you may find it necessary or prudent to coordinate with nonprofit organizations and stakeholders, including the Coastal States Organization. That said, you will not retain any responsibilities associated with the Coastal States Organization and your contacts with the Coastal States Organization in this regard will not concern any particular matters involving specific parties in which the Coastal States Organization is a party or represents a party.

Otherwise Disqualifying Financial Interest

Because you continue to be an employee of the Coastal States Organization, the financial interests of the Coastal States Organization are imputed to you for the purposes of 18 U.S.C. § 208(a). Absent a waiver from the imputed interest, you would be prohibited from participating in any particular matter that directly and predictably affects the Coastal States Organization's financial interests.

Application of Applicable Law to Your Request for a Waiver and Decision

You seek a waiver under 18 U.S.C. § 208(b)(1) to permit you to participate in particular matters as an employee of the EPA that may have an effect on the financial interests of the Coastal States Organization. As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the

Government may expect from you, the employee. *See* 18 U.S.C. §208(b)(1); 5 C.F.R. § 2640.301. As articulated in the 18 U.S.C. § 208, and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee.

In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You will be on an IPA assignment from the Coastal States Organization although EPA will reimburse the Coastal States Organization for your non-profit organization salary and benefits;
- Other than pro forma administrative requirements, you will not retain any employment duties or responsibilities associated with the Coastal States Organization;
- Coastal States Organization is not directly regulated by EPA, but some of its members may be regulated by EPA and serve as co-regulators in carrying out EPA's environmental mandates;
- Your position on the IPA detail will not involve your personal and substantial participation in specific party matters in which the Coastal States Organization is a party, or represents a party; and
- You will not participate personally and substantially in any particular matter that would directly and predictably affect your employment, salary, or other benefits from the Coastal States Organization.

I have considered these factors carefully, as well as the fact that you will not participate in particular matters in which the Coastal States Organization is a party or represents a party. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the Coastal States Organization both assigned you to work on coastal and ocean issues across the federal landscape. The "integrity of the services" that EPA and the Coastal States Organization expect from you in your current position is to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, the Coastal States Organization recognized that your EPA scope of work may entail working directly on particular matters that involved it but placed no parameters on your ability to represent EPA's interests over theirs. There was no limit on the performance of those duties even if those duties were not fully aligned with the interests of the Coastal State Organization on a particular matter. That said, as part of your EPA duties, you will not work on any specific party matter in which the Coastal States Organization is a party or represents a party. Rather, you will work broadly on developing and implementing an outreach strategy for

the National Estuary Programs, Interagency Coastal Wetlands Workgroup, Coral Reef Task Force, Climate Ready Estuaries, Urban Waters and other water partnership programs, so that they can achieve closer ties with their on-the-ground partners. You will be leveraging your past experience with the coastal state management community to put EPA in a better position to reach its partners.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities. By agreeing to let you work directly with EPA to expand its coastal management community outreach and partnership efforts, your employer understands the implications of your participation. Your work will not affect the ability or willingness of your employer to maintain your position of record. I therefore do not find that your imputed financial interest in the Coastal States Organization is likely so substantial as to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Scope of Waiver and Limitations

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you during your IPA detail and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208(a) to participate in particular matters of general applicability that affect the financial interests of the Coastal States Organization as a member of a discrete and identifiable class, so long as such matters do not have a special or distinct effect on the financial interests of the Coastal States Organization other than as part of a class. This waiver is limited, however, and does not permit you to participate in any other particular matter, including any particular matter involving specific parties in which the Coastal States Organization is or represents a party or otherwise has a financial interest. Moreover, you may not participate in any particular matter that would have a direct and predictable effect on your employment, salary, or other benefits from the Coastal States Organization. This waiver will cease to be effective when your IPA detail ends.

Conclusion

Based on the factual circumstances of this request, including the expectations of the Coastal States Organization and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

You must keep in mind that this waiver does not apply to any particular matter other than those discussed above. While on the IPA assignment you will continue to be subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the

criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Director of the Ethics Law Office, or me.

As required, my staff consulted with the Office of Government Ethics, prior to the issuance of this waiver. *See* 5 C.F.R. § 2640.303. Your appointing official in the Office of Wetlands, Oceans and Watersheds agrees to this waiver. Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

cc: Grace M. Robiou, Branch Chief, Ocean and Coastal Management Branch
Sandra Connors, Deputy Ethics Official, Office of Wetlands, Oceans and Watersheds
Justina Fugh, Director, Ethics Law Office